

Public Office (Accountability) Bill – Equalities Impact Assessment for the Misconduct in Public Office measures

Introduction

- This document records the equality analysis of the misconduct in public office measure being introduced by the Ministry of Justice (MoJ) in the Public Office (Accountability) Bill. It fulfils the requirements placed on them by the Public Sector Equality Duty (PSED) as set out in section 149 of the Equality Act 2010 (the EA).
- The measure considered in this Equalities Impact Assessment (EIA) will:
 - a) Abolish the current common law offence of Misconduct in Public Office
 - b) Introduce an offence of breach of duty to prevent death or serious injury
 - c) Introduce an offence of seriously improper acts
 - d) Create a statutory list of public office holders for the purpose of the new offences

Equality Duties

Section 149 of the EA places a duty on Ministers and the Department, when exercising their functions, to have ‘due regard’ to the need to:

- a. Eliminate unlawful discrimination, harassment and victimisation and other prohibited conduct under the EA;
- b. Advance equality of opportunity between different groups (those who share a relevant protected characteristic and those who do not); and
- c. Foster good relations between different groups (those who share a relevant protected characteristic and those who do not).

In line with our responsibilities under the EA, the Department has considered the “protected characteristics” – namely race, sex, disability, sexual orientation, religion and belief, age, gender reassignment, pregnancy, and maternity. The Department’s assessment is that none of the proposals (the abolition of the common law offence, the offence of breach of duty to prevent death or serious injury, the offence of seriously improper acts, the statutory list of public office holders) are either directly or indirectly discriminatory within the meaning of the EA. They apply in the same way to all individuals and do not treat people less favourably because of their protected characteristics.

Misconduct in Public Office

A) Abolishment of the common law offence

Introduction

- By abolishing the current common law offence of Misconduct in Public Office and replacing it with two new statutory offences, the aim is to improve the clarity of the criminal law. In particular, the statutory offences will be clear as to who they apply to; what conduct they capture, and in what circumstances. There is no intention to make significant changes to the scope of the offence as it currently exists, or broadly to the conduct it captures. The measure will help to ensure that public officials continue to be held to account to protect the public.

Policy summary

- The criminal offence of misconduct in public office is a common-law offence dating back hundreds of years, with its terms established through case law rather than in legislation. The offence is committed by a public office holder who, while acting as such, either wilfully neglects to perform their duty or misconducts themselves to such a degree that it amounts to an abuse of the public's trust in that office¹. It carries a maximum sentence of life imprisonment.
- Until the 21st century the numbers of prosecutions for the offence were relatively low, but as they have increased, so has the pressure to review it. The substantial body of case law has refined and sometimes shifted the terms of the offence – and it has started to be used in novel contexts, generating controversy.
- The Law Commission undertook a review of the common law offence as part of its 11th programme of law reform to decide whether the existing offence should be abolished, retained, restated or amended.² Following this the Commission recommended that the common law offence be abolished and replaced with new statutory offences to ensure the scope and application of the offence is clear in future.
- In line with the Commission's recommendations, the government will be abolishing the common law offence and replacing it with the two new statutory offences detailed below. To ensure it is clear who could be caught by the offences, a definitive and exhaustive list of who is considered a "public office holder" for the purposes of the offences, will be set out in the legislation.
- The proposed change will have a direct impact on all public office holders captured by the new offences.

¹ AG's Reference (No 3 of 2003) [2004] EWCA Crim 868; [2005] QB 73

² [Misconduct in Public Office – Law Commission](#)

- The most significant change is in respect of the potential penalty for the offence which will be changing from a maximum of life imprisonment to a maximum of imprisonment of 10 years' (for the seriously improper acts offence) and 14 years' (for the breach of duty offence).

B) Breach of duty to prevent death or serious injury

Introduction

- In its report the Law Commission identified that the current offence criminalises conduct which can be broadly split into two categories: (a) breach of a duty in public office and (b) corruption in public office. They therefore recommended that the two types of conduct should be separated into two new statutory offences.
- The statutory breach of duty offence corresponds most closely to that part of the current common law offence which criminalises cases where a public officer 'wilfully neglects to perform his duty to the extent that it amounts to an abuse of the public's trust in that office holder'.
- The new offence will apply where a public office holder is subject to (and is aware that they are subject to) a duty to prevent death or serious injury as a function of their role; they breach that duty recklessly or intentionally; and the conduct falls far below the standard reasonably expected of them in the circumstances.

Policy summary

- The new breach of duty offence closely replicates elements of the existing common law offence, with improvements as recommended by the Law Commission. It will apply where a person who holds a public office causes (or creates a significant risk of causing) critical harm to someone else when they are under a duty to prevent that harm. The duty is specific to role in question, rather than being of general application to all public office holders. They must understand they are under that duty and proceed intentionally or recklessly despite that. The act constituting the breach must fall far below what could reasonably be expected of them in the circumstances. Honest mistakes or finely balanced operational decisions will not be caught by this offence.
- There will be a defence under this offence if the public office holder can show that they had a reasonable excuse for their conduct.
- To reflect the serious nature of the conduct itself and the breach of public trust inherent in this offence the maximum sentence on conviction will be 14 years and the offence will remain indictable only. Proceedings under this offence will require the consent of the Director of Public Prosecutions (DPP).

- The aim of the policy is to ensure this type of criminal behaviour will continue to be captured efficiently and effectively by the criminal law and to ensure clarity for public office holders and victims of this type of crime on when and how the offence is committed.
- The proposed change will have a direct impact on public office holders accused of this offence because the maximum penalty for the offence will be 14 years imprisonment upon conviction. Given the new offence is behaviour already prosecuted under the common law offence it is expected to have a negligible impact on victims.

C) Seriously improper acts

Introduction

- The second category of offending identified by the Commission in its report was 'corruption in public office' which they also recommended should become a separate statutory offence.

Policy summary

- The new statutory offence that will capture corrupt conduct by public office holders will be known as the 'seriously improper acts' offence. It will capture the same corrupt behaviour as the common law offence and is in line with the Commission's recommendations.
- Under this measure a public office holder commits an offence if they use their public office or position for the purpose of obtaining a benefit (to themselves or another person); or causing a detriment to someone else, when they knew (or should have known) that a reasonable person would view their behaviour as seriously improper. This can be any benefit or detriment, whether temporary or permanent including financial gain or loss; protection or enhancement of (or damage to) a person's reputation; or a benefit or detriment of a physical or sexual nature.
- There is a non-exhaustive list of factors for the jury to consider when determining whether an act is seriously improper, such as whether there was an intention to mislead or other dishonesty; whether it involved a conflict of interest or breach of trust; the nature and degree of any benefit or detriment; and the extent the act had the potential to undermine public confidence in their office, or wider public offices and functions.
- There will be a defence under this offence if the public office holder can show that they had a reasonable excuse for their conduct.
- The offence will have a maximum penalty of 10 years, remains indictable only, and will require the consent of the Director of Public Prosecutions (DPP).
- The policy intention is to ensure this type of criminal behaviour will continue to be captured by the criminal law and to ensure clarity for public office holders and victims of this type of crime on when and how the offence is committed.

- This offence will have a direct impact on defendants as the maximum penalty will be reducing from a maximum of life imprisonment to a ten year maximum. The impact on victims is expected to be negligible.

(D) Statutory list of public office holders

Policy summary

- To determine whether a public office holder is in scope of the new offences, the Commission proposed that there should be a statutory list setting out public office holders for the purposes of the new offences. This would provide an outer boundary to the pool of people who could be treated as being in “public office” and would assist public officials, and those working in quasi-public roles, to understand whether they may be subject to the offence. It would also assist police and prosecutors when making charging decisions.
- We will be including a comprehensive list on the face of the legislation. It will affect all those on the list. Given the detailed and technical nature of the list, and the potential need for amendment in future, the list will be able to be amended by regulations made pursuant to the affirmative resolution procedure. The list will achieve a key part of our policy objective of improving the clarity of the criminal law, by being clear about who the offences will apply to.

Equalities Data Analysis

Affected Persons

- This legislation will affect public office holders, certain private contractors and victims of this crime.

Sources of Data

- To assess the equalities impacts on defendants of the offences we have used the existing common law offence of Misconduct in Public Office as a proxy.
- The main source of information for the equalities impact analysis are the Ministry of Justice’s Criminal Justice Statistics Quarterly: Outcomes by Offence Tool to June 2024. The latest census data with detailed ethnicity data in the UK is the 2021 census, which was published in December 2022. Detailed data on offence outcomes is only available for three of the nine protected characteristics- age, sex, and race. Due to limitations in data collection, the Department is not able to identify the likely impacts of this policy on other protected characteristics.
- Data is presented where known, therefore where an individual’s sex, ethnicity, or age is not stated or unknown, they are omitted from the analysis.
- Typically, we use the Office for National Statistics Crime Survey (CSEW) of England & Wales to assess the impacts of new offences on victims. However,

the CSEW does not collect data on this crime type so it cannot be used. We expect the impact on victims to be negligible given convictions are not expected to increase.

Sex

- In the year ending June 2024, there were 67 cases proceeded against for Misconduct in Public Office. Of the 67 cases, 43% of offenders were female, 40% were male and the remainder unknown.
- The department anticipates the impact of this legislative change to be felt equally by males and females.

Race

- Across England and Wales, white individuals make up the majority of the population at 81.7%. For Misconduct in Public Office, where the ethnicity is known, white individuals made up 85.3% of individuals proceeded against in the year ending June 2024.
- The proportion of those from ethnic minority backgrounds who were proceeded against for Misconduct in Public Office in the year to June 2024 was relatively similar to their representation in the general population.
 - In the year to June 2024, Asian individuals make up 8.8% of those proceeded against, compared to 9.3% of the total population.
 - Similarly, black individuals constitute 2.9% of those proceeded against, compared to 4% of the total population.
 - Those who identify as mixed race account for 2.9% of individuals proceeded against and 2.9% of the population.
- The department does not anticipate any impacts on the basis of race from this measure.

Age

- In the year ending June 2024, 100% of those proceeded against were adults. Of which, 60% were aged between 25-39, 30% over 40 and 10% were younger than 25.
- The department does not anticipate any equalities impacts based on age from this legislation.

Other protected characteristics

- The Department is currently not able to identify the likely impacts of this policy on the other protected characteristics of disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, religion or belief for the cohort of defendants and potential victims likely to be affected.

- The department does not anticipate any impacts because the policy intention is not to make significant changes to the scope of the current common law offence. The number of individuals affected is also small.

Victims, Witnesses and the general public

- The Department is not able to identify by protected characteristics the victims or witnesses involved in the cases of the specific cohort of defendants affected by this change due to a lack of available data. However, given the policy rationale behind this change is not to make significant changes to the scope of the current common law offence as far as possible, any impact is likely to be minimal.

Eliminating unlawful discrimination, harassment

Direct Discrimination

- Direct discrimination occurs when a policy would result in people being treated less favourably because of a protected characteristic. The offences will apply to all regardless of their protected characteristic. As a result, these measures do not involve direct discrimination within the meaning of the Equalities Act because they do not treat people unfavourably due to their protected characteristics.

Indirect Discrimination

- Indirect discrimination occurs when a policy applies equally to all individuals but would put those sharing a protected characteristic at a particular disadvantage compared to those who do not. The Department has concluded from the information available, that any impacts of this policy on the protected characteristics is likely to be minimal due to the small number of cases overall and because of the limited change to the scope of the criminal law. The case data also suggests that no particular cohort sharing a protected characteristic is over-represented in prosecutions for the current offence. The reforms will provide greater certainty on how and when the offences can be committed, as well as who is within scope (for both offenders and victims) so we consider the increased consistency and transparency that this will bring will ensure there is less scope for any indirect discrimination.

Discrimination arising from disability and duty to make reasonable adjustments

- The Department does not consider that there is likely to be any discrimination in relation to disability and will continue to make reasonable adjustments for disabled people impacted by the policy proposals.

Harassment and victimisation

- The Department does not consider there to be a risk of harassment or victimisation within the meaning of the Equality Act 2010 as a result of this change.

Advancing Equality of Opportunity

- The Department has had regard to this aspect of the equality duty and considers these changes may affect the advancement of equality of opportunity by ensuring that public officials must act fairly and appropriately or face criminal consequences. There may therefore be positive impacts for victims and offenders due to the clarity on scope and application being introduced by these changes which may affect certain groups more.

Fostering Good Relations

- The Department's assessment is that these changes may also have a positive impact on fostering good relations between groups with different protected characteristics because they will ensure public officials act fairly and appropriately in their official capacity.

Mitigation

- As there are no adverse impacts identified, the department is not planning any mitigating action.

Decision Making

- This legislation will affect public office holders, certain private contractors and victims of this crime, and the general public who interact with public office holders. Having summarised the only available data on the protected characteristics of sex, race and age the department concluded that it would be reasonable to proceed with the policy given the minimal impact expected on any of them.